

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BOB BAFFERT,

Plaintiff,

v.

THE NEW YORK RACING
ASSOCIATION, INC.,

Defendant.

Civil Action No. 1:21-cv-03329-
CBA-RML

**AFFIDAVIT OF
DAVID T. O'ROURKE**

STATE OF NEW YORK)
)
) ss.:
COUNTY OF NASSAU)

DAVID T. O'ROURKE, being duly sworn, deposes and says:

1. I am the Chief Executive Officer (“CEO”) and President of Defendant The New York Racing Association, Inc. (“NYRA”) in the above-captioned action.

2. I joined NYRA as Director of Financial Planning in 2008 before being named Vice President for Corporate Development in 2010. In 2013, I was appointed Chief Revenue Officer and Senior Vice President. In January 2019, I served as NYRA’s interim CEO and Chief Revenue Officer before being appointed President and CEO in March of 2019 by NYRA’s Board of Directors.

3. I am not currently an employee of New York State, nor have I ever been an employee of New York State.

4. I submit this affidavit and the attached exhibits in opposition to Plaintiff Bob Baffert’s motion for a preliminary injunction.

NYRA

5. NYRA is a not-for-profit corporation organized as a racing association.

6. NYRA operates three racetracks and pari-mutuel wagering facilities in New York State (“the State”): (1) Aqueduct Racetrack in Queens County; (2) Belmont Park Racetrack in Nassau County; and (3) Saratoga Race Course in Saratoga County (collectively, “the Racetracks”).

7. NYRA was incorporated on or about September 12, 2008 shortly after the conclusion of a Chapter 11 bankruptcy of NYRA’s predecessor, the New York Racing Association Inc.

8. NYRA was formed for the purpose and objective of conducting race meetings and pari-mutuel wagering at the Racetracks and furthering the raising and breeding of horses, including exercising the particular powers conferred by Section 203 of the Racing Law, which includes the power and right to hold running race meetings and “to hold, maintain and conduct running races at such meetings.” N.Y. Rac. Pari-Mut. Wag. & Breed Law § 203.

9. On or about September 12, 2008, the State of New York (“the State”) granted NYRA an exclusive 25-year franchise to conduct Thoroughbred racing and related operations at the Racetracks.

10. NYRA performs its functions under a written Franchise Agreement with the State.

11. NYRA is governed by a privately controlled board of directors consisting of 17 persons, six of whom are appointed by elected officials.

12. NYRA has its own bylaws and follows corporate formalities, such as board meetings (which are not open to the public), the purchasing of insurance, and the formation and operation of special committees.

13. NYRA also sets its own executive compensation and appoints its own officers.

14. NYRA leases its property from the State.

15. NYRA, however, is solely responsible for the payment of all impositions, utilities, and operating expenses for the Racetracks.

16. NYRA has the right “to develop, redevelop, refurbish, renovate or make such other improvements, capital expenditures or otherwise” to property it leases from the State “and the fixtures and improvements thereon, as shall be necessary or desirable for the operation” of the property “for the uses permitted.” (Saratoga Ground Lease between the State and NYRA, § 4.1(a), attached as an exhibit to the accompanying Declaration of Henry M. Greenberg.)

17. NYRA is also obligated “to repair, alter, restore, replace and rebuild” the premises it leases in the event of a casualty (*id.* at § 11.2(a)) and is responsible for performing and bearing the costs of “all maintenance, repair and upkeep of” the leased property “including the Improvements thereon” (*id.* at § 5.3).

Bob Baffert

18. Plaintiff Bob Baffert is an owner and trainer of Thoroughbred horses and a well-known figure in the sport.

19. Horses trained by Baffert have won numerous significant races.

20. But controversy has often followed Baffert.

21. Starting in 2011, for example, seven horses trained by Baffert in California died suddenly over a 16-month period. *See* Joe Drape, *California Examines Puzzling Trend of Horses' Sudden Deaths*, N.Y. Times, Apr. 11, 2013, <https://www.nytimes.com/2013/04/11/sports/california-examines-puzzling-trend-of-horses-sudden-deaths.html>; *see also* Gus Garcia-Roberts & Steven Rich, *The dark side of Bob Baffert's reign*, Washington Post, Jun. 18, 2021 (reporting that at least 74 horses have died in Baffert's care

in California since 2000, trailing only two of hundreds of trainers in the state),

<https://www.washingtonpost.com/sports/2021/06/18/bob-baffert-horse-deaths-drug-violations/>.

22. Upon information and belief, over the course of Baffert's career, his horses have been cited for drug-related violations at least 30 times.¹ The frequency of those drug-related violations has increased over time and include the following violations from 2010-2019:

- a. On or about January 7, 2010, the California Horse Racing Board imposed a \$1,000.00 fine on Baffert when a horse he trained tested positive for Flunixin after racing at the Santa Anita Race Track on January 7, 2010.
- b. Baffert received a \$250.00 fine from the California Horse Racing Board on or about October 23, 2016 after a horse he trained tested positive for Phenylbutazone in excess of the permitted level at Santa Anita Race Track on October 23, 2016.
- c. On or about July 2, 2017, the California Horse Racing Board then imposed a \$1,000.00 fine on Baffert when another horse trained by him received a positive test for Phenylbutazone in excess of the permitted level at Santa Anita Park on July 2, 2017.
- d. Roughly two years later, on or about July 27, 2019, the California Horse Racing Board imposed a \$500.00 fine on Baffert after a horse he trained raced at Del Mar Race Track and tested positive for Phenylbutazone on July 27, 2019.

¹ See Joe Drape, *Kentucky Derby Winner Medina Spirit Fails Drug Test*, N.Y. Times, May 9, 2021 (updated June 2, 2021), <https://www.nytimes.com/2021/05/09/sports/horse-racing/bob-baffert-kentucky-derby-medina-spirit-drug-test.html>; Tori B. Powell, *Churchill Downs Suspends Trainer Bob Baffert for Two Years After Horse's Failed Drug Test*, CBS News (June 2, 2021), <https://www.cbsnews.com/news/bob-baffert-suspended-medina-spirit-drug-test/>.

e. A few days later, on or about August 3, 2019, Baffert received a \$1,500.00 fine from the California Horse Racing Board when another horse trained by him tested positive for Phenylbutazone after racing at Del Mar Race Track on August 3, 2019.

Baffert's Four Drug Violations Prior to the Kentucky Derby

23. In the 12 months preceding the running of this year's Kentucky Derby, the frequency of Baffert's drug-related violations increased.

24. Horses trained by Baffert tested positive for prohibited or excessive substances four times in Arkansas, California and Kentucky. Each of these drug-related violations resulted in fines.

25. Specifically, on or about July 14, 2020, the Arkansas Racing Commission imposed a \$5,000.00 fine on Baffert after a horse he trained tested positive for 3-hydroxylidocaine after a race at Oaklawn Park on May 2, 2020.

26. Also, on or about July 14, 2020, the Arkansas Racing Commission imposed a second \$5,000.00 fine on Baffert when another horse he trained tested positive for 3-hydroxylidocaine, also at Oaklawn Park on May 2, 2020.

27. On or about November 29, 2020, the California Horse Racing Board imposed a \$2,500.00 fine on Baffert when a horse trained by him tested positive for dextromethorphan after running at Del Mar Racetrack on July 25, 2020.

28. And, on or about January 30, 2021, the Kentucky Horse Racing Commission ("KHRC") imposed a \$1,500.00 fine on Baffert when a horse he trained tested positive for betamethasone, after running in the Longines Kentucky Oaks race at Churchill Downs on September 4, 2021. Baffert's horse was disqualified from the race and all purse money forfeited.

29. Rarely in the history of Thoroughbred racing has there been such a confluence of drug positives involving as prominent a trainer as Plaintiff.

The 2021 Kentucky Derby

30. In the wake of the four drug testing violations Baffert committed in 2020 and 2021, he entered in the Kentucky Derby a three-year-old horse trained by him named Medina Spirit (“MEDINA SPIRIT”).

31. The Kentucky Derby, which is the first leg of the Triple Crown, is the most famous American horse race and one of the most prestigious horse races in the world.

32. This year’s Kentucky Derby — the 147th in its storied history — was held at Churchill Downs Racetrack on May 1, 2021.

33. An estimated 14.4 million viewers watched the race, making it the third most-watched non-football game since the COVID-19 pandemic began. *See John Clay, Back to Nearly Normal, Kentucky Derby TV ratings surge over last year,* Lexington Herald-Leader, May 4, 2021, <https://www.kentucky.com/sports/spt-columns-blogs/sidelines-with-john-clay/article251160359.html>.

34. MEDINA SPIRIT, a 12-1 longshot, finished first in the race and was declared the winner of the Kentucky Derby.

35. Immediately following the race, however, testing from post-race blood samples revealed that MEDINA SPIRIT tested positive for betamethasone, a steroid anti-inflammatory drug.

36. Although Betamethasone is a permitted medication for horses in Kentucky, at least a 14-day withdrawal time is mandated before a race.

37. Any level of detection of betamethasone on race day is a violation under the KHRC equine medication protocols.

38. KHRC is the state agency in Kentucky charged with regulating the conduct of horse racing and pari-mutuel wagering on horse racing and related activities.

39. Betamethasone is a permitted medication for horses in New York State, but at least a 7-day withdrawal time is mandated before races.

40. New York law prohibits betamethasone at a threshold level of 10 picograms/ml. See 9 N.Y.C.R.R. § 4043.3(a)(3).

41. Medina Spirit's post-race drug test found 21 picograms of betamethasone measured per milliliter of blood.

42. On or about May 8, 2021, KHRC advised Baffert that MEDINA SPIRIT had tested positive for 21 picograms/ml of betamethasone and that an investigation would be conducted.

43. KHRC is empowered to impose sanctions on Baffert and disqualify MEDINA SPIRIT as the winner of the Kentucky Derby, depending on the findings and outcome of the investigation.

Baffert Denies MEDINA SPIRIT Was Given Betamethasone

44. On or about May 9, 2021, Baffert held a press conference, in which he disclosed to the public that MEDINA SPIRIT had tested positive for betamethasone and that KHRC was conducting an investigation.²

45. During the press conference, Baffert repeatedly denied that MEDINA SPIRIT was ever given or treated with betamethasone.

² A video of the press conference can be accessed at the following link: <https://www.youtube.com/watch?v=Iflelm0oGTg>.

46. Baffert stated that “there is something not right” and “something wrong here,” “I do not feel safe” and “we’re sitting ducks, basically, and it’s getting worse,” suggesting that “regulators” acted unfairly by sanctioning him for the presence of “contamination levels” of medication in his horses.

47. Additionally, Baffert stated: “I’m not a conspiracy theorist, I know everybody is not out to get me, but there is definitely something wrong. Why is it happening, you know, to me, you know. There’s problems in racing but it is not Bob Baffert.”

48. In a similar vein, Baffert observed:

- “It’s just, it’s shocking. I still, you know. And so, this shouldn’t have happened. So, I don’t know what, there’s a problem somewhere. It didn’t come from us. Something happened there. We don’t know what it is.”
- “I just say, it just seems odd. That why am I the only one that has, uh, you know, the contaminations? Why am I the only one?”

Churchill Downs Suspends Baffert

49. On or about May 10, 2021, Churchill Downs Racetrack suspended Baffert from entering horses and explained its decision in a press release that stated as follows:

It is our understanding that Kentucky Derby winner Medina Spirit’s post-race blood sample indicated a violation of the Commonwealth of Kentucky’s equine medication protocols. The connections of Medina Spirit have the right to request a test of a split sample and we understand they intend to do so. To be clear, if the findings are upheld, Medina Spirit’s results in the Kentucky Derby will be invalidated and Mandaloun will be declared the winner.

Failure to comply with the rules and medication protocols jeopardizes the safety of the horses and jockeys, the integrity of our sport and the reputation of the Kentucky Derby and all who participate. Churchill Downs will not tolerate it. Given the seriousness of the alleged offense, Churchill Downs will immediately suspend Bob Baffert, the trainer of Medina Spirit, from entering any horses at Churchill Downs Racetrack. We will await the conclusion of the Kentucky Horse Racing Commissions’ investigation before taking further steps.³

³ Churchill Downs Incorporated, *Churchill Downs’ Statement in Response to Medina Spirit’s Post-Race Test Result Allegations*, May 9, 2021,

Baffert Continues to Deny MEDINA SPIRIT Was Given Betamethasone

50. Also on or about May 10, 2021, Baffert gave multiple interviews to the media in which he continued to deny that MEDINA SPIRIT was given betamethasone and chalked-up Churchill Downs' suspension as a case of "cancel culture."

51. For example, on the Dan Patrick Show, Baffert stated that MEDINA SPIRIT has never been treated with that specific drug. So, we're, we're at a loss for words trying to figure out how he got contaminated, because at those levels they call it contamination.⁴

52. With respect to Churchill Down's suspension, Baffert stated: "I think it was just a knee jerk cancel culture kind of reaction."

53. In addition, Baffert floated a conspiracy theory:

I never been a conspiracy theorist. But I'm starting to suspect that, it's been happening to me on, on the big day. You know. And so. And we have really, have the security, we're watching them. I mean these horses live, they don't live in a bubble people, you know, their environment, their stalls, its open, you know, it's, people can walk through, you know, any time. We don't really. You know, we're not thinking. But it just, it just seems really, strange now that here's a horse that didn't get that specific drug. He was not treated with that. And it's uhm, it, you know, it, it's, that's what, that's mind-boggling right there that somebody either had to contaminate him somewhere. So, I, we just don't know that. I, I hate to speculate. But I, we don't know.

54. On ESPN's Sports Center, Baffert stated that MEDINA SPIRIT "was never administered" betamethasone.⁵

<https://www.churchilldownsincorporated.com/resources/kentucky-derby-and-oaks/churchill-downs-statement-in-response-to-medina-spirits-post-race-test-result-allegations/>.

⁴ A video of this interview can be accessed at the following link:
<https://www.youtube.com/watch?v=Akhz1CUy-HY>.

⁵ A video of this interview can be accessed at the following link:
<https://www.youtube.com/watch?v=h4UKmQdJ8n4>.

55. On Fox News,⁶ Baffert stated:

- “That horse has never been treated with [betamethasone]”;
- “It did not happen, and that that’s the really seriously troubling part of it. And we’re, uhm, you know, I’m hiring investigators but sometimes you never find out. And, it’s just, it’s a, it’s just a tragedy what’s happening in this race.”
- “Bob Baffert is not stupid. That’s not a drug that I would, I would use on a horse. We don’t use that horse, we don’t use that drug. The horse never had it in him, and we have the documentation. We’re going to show everything.”
- “Churchill Downs came out with that statement, that was pretty harsh. And I think they had to just, you know, it, it’s, with all the noise going out, out, you know, we live in a different world now. This, this America is different and this, and it was like a cancel culture kind of a, a thing so they’re reviewing it.”

Baffert Admits MEDINA SPIRIT Was Given Betamethasone

56. The next day, on or about May 11, 2021, Baffert reversed course, claiming for the first time that MEDINA SPIRIT was treated with an ointment containing betamethasone that was applied daily until the day before the Kentucky Derby.

57. In a written statement issued to the media, Baffert stated:

On May 8, 2021, I was informed by the Kentucky Horse Racing Commission that MEDINA SPIRIT allegedly tested positive for 21 picograms of betamethasone. On May 9, 2021, I held a press conference in which I stated that I intended to thoroughly investigate how this could have happened and that I would be completely transparent throughout the process. I immediately began that investigation, which has resulted in me learning of a possible source for the betamethasone, and now, as promised, I want to be forthright about what I have learned.

Following the Santa Anita Derby, MEDINA SPIRIT developed dermatitis on his hind end. I had him checked out by my veterinarian who recommended the use of an anti-fungal ointment called Otomax. The veterinary recommendation was to apply this ointment daily to give the horse relief, help heal the dermatitis, and prevent it from spreading. My barn followed this recommendation and MEDINA SPIRIT was treated with Otomax once a day up until the day before the Kentucky Derby. Yesterday, I was informed that one of the substances in Otomax is

⁶ A video of this interview can be accessed at the following link:
<https://www.youtube.com/watch?v=HACuhd7pMYQ>.

betamethasone. While we do not know definitively that this was the source of the alleged 21 picograms found in Medina Spirit's post-race blood sample, and our investigation is continuing, I have been told by equine pharmacology experts that this could explain the test results. As such, I wanted to be forthright about this fact as soon as I learned of this information.

As I have stated, my investigation is continuing and we do not know for sure if this ointment was the cause of the test results, or if the test results are even accurate, as they have yet to be confirmed by the split sample. However, again, I have been told that a finding of a small amount, such as 21 picograms, could be consistent with application of this type of ointment. I intend to continue to investigate and I will continue to be transparent. In the meantime, I want to reiterate two points I made when this matter initially came to light. First, I had no knowledge of how betamethasone could have possibly found its way into MEDINA SPIRIT (until now) and this has never been a case of attempting to game the system or get an unfair advantage. Second, horse racing must address its regulatory problem when it comes to substances which can innocuously find their way into a horse's system at the picogram (which is a trillionth of a gram) level. MEDINA SPIRIT earned his Kentucky Derby win and my pharmacologists have told me that 21 picograms of betamethasone would have had no effect on the outcome of the race. MEDINA SPIRIT is a deserved champion and I will continue to fight for him.⁷

Pimlico Racetrack Permits MEDINA SPIRIT to Race in the Preakness

58. On or about May 11, 2021, Baffert entered into a consent agreement with the Maryland Jockey Club, which owns and operates Pimlico Racetrack, in Baltimore, Maryland, where the Preakness Stakes is run.

59. Under the consent agreement, MEDINA SPIRIT was permitted to enter the Preakness Stakes, with rigorous medical and testing conditions.

Baffert Apologizes for His May 9 Press Conference

60. On or about May 15, 2021, Baffert apologized for unspecified statements he made during his initial announcement that MEDINA SPIRIT tested positive for betamethasone in an otherwise self-serving statement to the media.

⁷ Quoted in WKYT, *Baffert says ointment used for Medina Spirit's skin condition contained betamethasone*, May 11, 20201, <https://www.wkyt.com/2021/05/11/baffert-says-ointment-used-for-medina-spirits-skin-condition-contained-betamethasone/>.

61. Baffert's statement reads as follows:

As Medina Spirit prepares to run in the Preakness Stakes today, I want to keep the focus on this amazing equine athlete and not me, which is the primary reason I will not personally be in attendance. I do not want to serve as a distraction to what has always been of paramount importance — the joy of this great sport and the horses that make it possible.

As I have stated from the beginning, there was never any attempt to game or cheat the system and Medina Spirit earned his Kentucky Derby win. While the presence of 21 picograms of an allowable therapeutic medication has yet to be confirmed by the split sample analysis, it would have nothing to do with Medina Spirit's hard earned and deserved win. That win was the result of the horse's tremendous heart and nothing else.

Notwithstanding the foregoing, I acknowledge that I am not perfect and I could have better handled the initial announcement of this news. Medina Spirit's Kentucky Derby win was so personally meaningful to me, and I had such a wonderful experience on May 1 at Churchill Downs, that when I got the news of the test results, it truly was the biggest gut punch I had ever received and I was devastated. That, coupled with the fact that I always try to be accommodating and transparent with the media, led to an emotional press conference on May 9 in which I said some things that have been perceived as hurtful to some in the industry. For that I am truly sorry. I have devoted my life's work to this great sport and I owe it, and those who make it possible, nothing but an eternal debt of gratitude.

For those who want an explanation for what transpired with Medina Spirit, I have tried to be open and transparent from the beginning. Our investigation is continuing and I don't have definitive answers at this point. What I do know is that neither my barn, nor my veterinarians, directly treated Medina Spirit with the anti-inflammatory medication betamethasone. Even though it is allowable, it is just not something we have ever used with this horse. The only possible explanation that we have uncovered to date — and I emphasize the word possible — is that betamethasone is an ingredient in a topical ointment that was being applied to Medina Spirit to treat a dermatitis skin condition he developed after the Santa Anita Derby.

I have been deeply saddened to see this case portrayed as a “doping” scandal or betamethasone labeled as a “banned” substance. Neither is remotely true. Betamethasone is an allowable and commonly used medication in horse racing. Further, 21 picograms would have zero pharmacology in a horse. All I ask is that everyone not rush to judgment and allow all of the facts, evidence and science to come to light.

Lastly, while this has been extremely hard and emotionally draining on me and my family, today is not about Bob Baffert. Instead it is about Medina Spirit and

all of the other equine athletes in our tremendous sport. I hope that everyone will direct their attention to them and give them the love and respect they so richly deserve.⁸

62. On or about May 15, 2021, MEDINA SPIRIT ran in the Preakness Stakes and finished third.

NYRA Temporarily Suspends Baffert

63. For weeks the scandal surrounding MEDINA SPIRIT's positive test at the Kentucky Derby dominated media coverage of Thoroughbred racing.

64. Public attention and scrutiny quickly focused on whether NYRA would permit MEDINA SPIRIT to race at the Belmont Stakes on June 5, 2021 and (like Churchill Downs) suspend Baffert from its Racetracks.

65. The Belmont Stakes is a historic race of immense importance to NYRA and American sports.

66. First run in 1867, the Belmont Stakes is the oldest of the three Triple Crown races, and traditionally called "The Test of the Champion" because it is the longest of the Triple Crown races.

67. As the final leg of the Triple Crown — and given its storied history — the Belmont Stakes is one of America's most famous and prestigious races.

68. The Belmont Stakes is a wildly popular race, with millions of viewers on television and tens of millions of dollars wagered each year. The single-day attendance record for the race was 120,139 in 2004. See *Belmont Stakes Factoids*, Belmont Stakes, <https://www.belmontstakes.com/history/belmont-stakes-factoids>.

⁸ Quoted in *Bob Baffert's full statement on Medina Spirit*, NBC Sports, May 15, 2021, <https://sports.nbcspor.../2021/05/15/bob-baffert-medina-spirit-preakness-statement/>.

A. **NYRA's Commitment to Racing Safety and Integrity**

69. In considering how to respond to the scandal created by Baffert's conduct, NYRA was mindful of its highest priorities — the safety and welfare of horses and jockeys competing at the Racetracks and ensuring the integrity of the sport.

70. NYRA is committed to providing the safest possible environment for racing and training by adopting and implementing the best proven safety practices in consultation with independent experts, veterinarians, horsemen and regulators.

71. NYRA's commitment to racing safety and integrity was exemplified by its strong public support of the passage of the Horseracing Integrity Act, legislation passed to create an independent horse racing anti-doping authority for the purposes of developing and implementing a horseracing anti-doping and medication control program as well as a racetrack safety program.

See David T O'Rourke, NYRA's David O'Rourke: Horseracing Integrity Act 'Vital to Equine Health, Integrity Of Our Sport', Paulick Report, Jan. 27, 2020,

<https://www.paulickreport.com/news/the-biz/nyras-david-orourke-horseracing-integrity-act-vital-to-equine-health-integrity-of-our-sport/>.

I have also been vocal about equine safety policies and procedures in general throughout my time serving as CEO and president. *See, e.g., David Grening, Q and A: NYRA's David O'Rourke, Daily Racing Form, July 8, 2019,*

<https://www.drf.com/news/q-and-nyras-david-orourke>.

72. Medication and substance violations — like those alleged against Baffert in connection with the Kentucky Derby and which led to his suspension from Churchill Downs — jeopardize the safety of horses and jockeys and compromise the integrity of the sport.

73. Although not all medications are performance enhancing, withdrawal times and other restrictions on their use are strictly enforced because even the use of legal therapeutic drugs

often masks injuries and can lead to fatal breakdowns during training or racing, causing devastating effects on the treated horse and other horses and riders in the race.

74. Thus, Baffert's extensive record of drug violations, especially the five positive tests in 2020-2021, was a source of grave concern for NYRA.

B. NYRA's Right to Ban Persons Detrimental to Racing

75. NYRA has a legal right to ban from its Racetracks individuals whose presence it finds detrimental to the best interests of racing.

76. In fact, the rules and regulations of the New York State Gaming Commission ("the Commission") codify the common law right of a racetrack operator to exclude individuals, including individuals possessing Commission-issued licenses.

77. Specifically, the Commission's regulation that addresses the power of a racetrack steward to exclude persons from the racetrack or suspend a license for up to 60 days, concludes with the following statement:

Nothing in this section shall be construed to limit any racing association or track licensee's power to exclude or deny any individual from its grounds or privileges thereon.

9 N.Y.C.R.R. § 4022.12.

78. The Commission's regulations also authorize NYRA to cancel or revoke entries of horses by any person without notice. *See id.* § 4025.2 ("The nominations or entries of any person, or the transfer of any nomination or entry, may be cancelled or revoked without notice by the racing association or in the discretion of the commission or of the stewards.").

C. **NYRA's Duty to Itself as an Organization and the Public**

79. NYRA has a vital business interest, indeed an obligation, in protecting its investment, brand and reputation, and supervising activities at its Racetracks so that our patrons have confidence that the sport is conducted in an honest and safe manner.

80. A breach of this obligation of proper supervision, especially with respect to matters of equine and jockey safety, may result in revocation of NYRA's franchise.

81. Specifically, the Franchise Agreement provides that NYRA must use its best efforts to meet various performance standards. (*See* NYRA's Franchise Agreement with the State, § 2.2, attached as an exhibit to the accompanying Declaration of Henry M. Greenberg.) Pursuant to one of these performance standards, NYRA "shall embrace objectives to encourage growth in on- and off-track handle" and "use its reasonable best efforts to maximize attendance at each of the Racetracks." (*Id.* § 2.2(h).) A separate performance standard requires NYRA to "consider . . . steps in consultation with industry experts to ensure jockey and equine safety." (*Id.* § 2.2(d).) Permitting Baffert to enter horses to race and occupy stall space at the Racetracks could undoubtedly mean failing to provide for the safety and welfare of horses and jockeys, in violation of both performance standards. Accordingly, NYRA's failure to abide by these performance standards could result in the revocation of its franchise.

82. Thus, it is imperative that NYRA maintain strict vigilance against medication and substance violations and take immediate steps against dishonest trainers, jockeys, owners and other licensees.

83. This is not only crucial to NYRA, but also the public and patrons of the Racetracks, who wager on races and depend on NYRA to conduct races in a fair and honest manner.

D. **NYRA Had a Duty to Temporarily Suspend Baffert**

84. Turning to Baffert, given the indisputable facts that were in the public domain, NYRA had not only a right but also the duty to temporarily suspend him, just as Churchill Downs did a few weeks earlier, to uphold the integrity of racing and protect NYRA, horses, jockeys and the public.

85. NYRA could not condone Baffert's reckless practices and undisputed substance violations, which jeopardize the safety of horses and jockeys and otherwise compromise the integrity of the sport.

86. Allowing Baffert to enter horses in races and stable horses at the Racetracks threatened the reputation of the Belmont Stakes and NYRA.

87. Baffert did not then have any horses entered in races or stabled at the Racetracks.

88. However, with the running of the Belmont on June 5 fast approaching, NYRA needed to act swiftly and resolutely, because it was possible, if not likely, that Baffert might seek to enter MEDINA SPIRIT in that race.

89. The failure to take swift and decisive action, unencumbered by the delay of a formal trial-type hearing (such as Baffert claims he was entitled), could also result in public scandal and ultimately a decrease in spectatorship, a substantial loss of revenues to the state and the race track, and even the potential decline of Thoroughbred racing in general as a sport, with consequent loss of jobs and investments.

90. Ultimately, I was responsible for the decision to suspend Baffert.

91. Accordingly, in a letter dated May 17, 2021, I advised Baffert that, effective immediately, he was temporarily suspended from entering horses to race and occupying stall space

at Belmont Park, Saratoga Race Course and Aqueduct Racetrack. (Attached hereto as **Exhibit A** is a true and correct copy of this letter.)

92. The letter identified the following specific grounds for the temporary suspension: (1) Churchill Downs' suspension of Baffert following the running of the Kentucky Derby and the reasons given for such suspension; (2) Baffert's four drug testing violations over the past year; and (3) Baffert's differing explanations and theories as to why Media Spirit tested positive for betamethasone.

93. The letter stated that Baffert's temporary suspension was imposed by NYRA in the "best interests of thoroughbred racing."

94. To do otherwise, the letter continued, "would compromise NYRA's investment in its operations as well as the public's perception of thoroughbred racing generally."

95. The letter noted that NYRA expected to make a final determination regarding the length and terms of Baffert's suspension based on information revealed during the course of the ongoing investigation in Kentucky.

96. Finally, the letter advised Baffert: "If you . . . wish to present to NYRA any information, data or arguments concerning this matter, please do so within seven business days from receipt of this letter."

97. Baffert never availed himself of this opportunity to be heard or raise any objection with NYRA, until nearly a month after the temporary suspension was imposed by the commencement of this action.

98. Should Baffert obtain evidence he can timely find and submit to NYRA for its consideration in connection with NYRA's final determination regarding the length and terms of Baffert's suspension, NYRA will consider such evidence.

99. NYRA's determination was made not on behalf of or in place of the Gaming Commission, but, rather, in furtherance of our independent responsibilities as a racetrack operator to protect the integrity of Thoroughbred racing and to preserve the confidence of the racing public in the integrity of our operations.

100. NYRA has an independent obligation to protect itself and its patrons, and to assure the public that it will act promptly and decisively when it comes into possession of evidence of wrongdoing or reckless conduct.

101. It was this independent obligation and interest which was indicated by NYRA's action which is being challenged in this proceeding.

Churchill Downs Suspends Baffert for Two Years

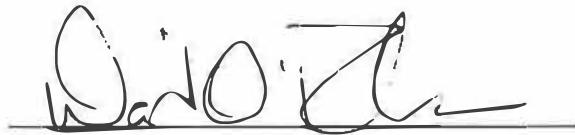
102. On June 2, 2021, an attorney for MEDINA SPIRIT's owner confirmed to the media that a second, independent lab confirmed the positive test of the Kentucky Derby winner's blood for betamethasone, at a prohibited level. See Joe Drape, *Positive Drug Test Confirmed for Kentucky Derby Winner Medina Spirit*, N.Y. Times, Jun. 2, 2021, <https://www.nytimes.com/2021/06/02/sports/horse-racing/kentucky-derby-medina-spirit-baffert.html>

103. Later that same day, Churchill Downs Incorporated ("CDI"), the parent company of Churchill Downs, announced the suspension of Baffert for two years effective immediately through the conclusion of the 2023 Spring Meet at Churchill Downs Racetrack.

104. That suspension prohibits Baffert, or any trainer directly or indirectly employed by Bob Baffert Racing Stables, from entering horses in races or applying for stall occupancy at all CDI-owned racetracks.

105. CDI's chief executive officer, William C. Carstanjen, explained CDI's decision as follows in a public statement:

Reckless practices and substance violations that jeopardize the safety of our equine and human athletes or compromise the integrity of our sport are not acceptable and as a company we must take measures to demonstrate that they will not be tolerated. Mr. Baffert's record of testing failures threatens public confidence in Thoroughbred racing and the reputation of the Kentucky Derby. Given these repeated failures over the last year, including the increasingly extraordinary explanations, we firmly believe that asserting our rights to impose these measures is our duty and responsibility.⁹



David T. O'Rourke

Sworn to before me this
30th day of June, 2021



Maria L. Diaz
Notary Public

MARIA L DIAZ
Notary Public - State of New York
No. 01DI6417863
Qualified in Nassau County
My Commission Expires 05/24/2025

⁹ Quoted in Steven Taranto, *Churchill Downs suspends trainer Bob Baffert for two years following Medina Spirit's drug test results*, CBS Sports, Jun. 2, 2021, <https://www.cbssports.com/general/news/churchill-downs-suspends-trainer-bob-baffert-for-two-years-following-medina-spirits-drug-test-reults/>

EXHIBIT A



DAVID T. O'ROURKE
Chief Executive Officer and President

May 17, 2021

VIA EMAIL & OVERNIGHT MAIL

Robert A. Baffert
Bob Baffert Racing Stables, Inc.
c/o dubaibob@aol.com

Dear Mr. Baffert:

On behalf of The New York Racing Association ("NYRA"), I write to advise that, effectively immediately, you are temporarily suspended from entering horses to race at Belmont Park, Saratoga Race Course and Aqueduct Racetrack.

As you know, on May 9, 2021, following the running of the Kentucky Derby, Churchill Downs Racetrack ("Churchill Downs") suspended you from entering any horses thereat. In that connection, Churchill Downs issued a public statement that explained the basis for its decision as follows:

It is our understanding that Kentucky Derby winner Medina Spirit's post-race blood sample indicated a violation of the Commonwealth of Kentucky's equine medication protocols. The connections of Medina Spirit have the right to request a test of a split sample and we understand they intend to do so. To be clear, if the findings are upheld, Medina Spirit's results in the Kentucky Derby will be invalidated and Mandaloun will be declared the winner.

Failure to comply with the rules and medication protocols jeopardizes the safety of the horses and jockeys, the integrity of our sport and the reputation of the Kentucky Derby and all who participate. Churchill Downs will not tolerate it. Given the seriousness of the alleged offense, Churchill Downs will immediately suspend Bob Baffert, the trainer of Medina Spirit, from entering any horses at Churchill Downs Racetrack. We will await the conclusion of the Kentucky Horse Racing Commissions' investigation before taking further steps.

In response to Churchill Downs' suspension, you have provided the media with different accounts and theories as to why Media Spirit tested positive for betamethasone, most recently blaming the result on a cream used on the horse by a veterinarian without your knowledge. In any event, Churchill Downs' suspension comes in the wake of at least four other drug testing violations of horses trained by you in just the past year, as found by state racing regulators in Arkansas, California and Kentucky.

In light of the above, and other related information, NYRA has determined that the best interests of thoroughbred racing compel the temporary suspension of your entering horses in races and occupying stall space at our racetracks. To do otherwise would compromise NYRA's investment in its operations as well as the public's perception of thoroughbred racing generally.

NYRA expects to make a final determination regarding the length and terms of your suspension based on information revealed during the course of the ongoing investigation in Kentucky. If you also wish to present to NYRA any information, data or arguments concerning this matter, please do so within seven business days from receipt of this letter.

Sincerely,



David O'Rourke

cc: Joseph Lambert, Esq.